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Supreme Court, U.S.
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No. 02-649

IN THE
Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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Pursuant to Rule 15.8, petitioners file this supplemental brief to address two recent developments: (1) the amicus brief of the United States and the Federal Trade Commission submitted on May 27, 2003 ("Gov't Br."); and (2) the recent decision in *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003), submitted to this court by letter on April 4, 2003.

The government's brief agrees with the key points of the petition: (1) that the Fourth Circuit established a new and "wrong test [for] determining" the fundamental issue whether certain price-fixing conduct comes within the reach of the Sherman Act (Gov't Br. 6); 2) that the Fourth Circuit's decision directly conflicts with this Court's jurisprudence — in particular, with *McLain v. Real Estate Board*, 444 U.S. 232, 242 (1980) (Gov't Br. 6-9); and 3) that the record evidence cited by petitioners, and "not disputed by respondents," is "sufficient to establish jurisdiction under *McLain*" (Gov't Br. 9-10).

The government, however, argues that the Fourth Circuit's fundamental error does not merit "plenary review" for two reasons. Gov't Br. 6, 10. First, it contends that the evisceration of this Court's decisions on subject matter jurisdiction and the *per se* rule does not warrant plenary review unless there is a conflict in the circuits between two cases with indistinguishable facts. Second, because petitioners offered an effect on prices instruction before timely objecting to (and later appealing) the erroneous instruction and special verdict that were given, as well as the dismissal based on that special verdict, petitioners allegedly did not make their arguments to the district court "with sufficient clarity . . . to warrant this Court's review." *See* Gov't Br. 6. These reasons are specious. The Fourth Circuit has decided incorrectly a question of broad importance, in conflict with decisions of this Court and other courts of appeals, and review by this Court is just as warranted in this

private suit as it would be if the issue arose in a government antitrust suit.

1. The government's brief cogently confirms the merits of petitioners' first asserted ground for certiorari — a direct conflict with this Court's own decision in *McLain* and with the seminal decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (essentially adopted by this Court in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)). Gov't Br. 7-8. Even in the absence of a conflict with more recent court of appeals decisions, this Court should nip in the bud such a rejection of its own precedent on a fundamental question of antitrust law that allows a *per se* violation to go unpunished. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).[1]

2. In any event, there exists a conflict with recent decisions from other courts of appeals that independently warrants this Court's review. Even if the government were correct that this case does not present a "clear conflict" between cases with indistinguishable fact patterns (*see* Gov't Br. 10), this should not militate against review by this Court in the circumstances here. The government agrees that the Fourth Circuit's decision establishes a new and "wrong" jurisdictional test (Gov't Br. 6), and it acknowledges that the First and Third Circuits have set forth the correct test established by this Court (Gov't Br. 11-12). This conflict in interpreting *Hartford Fire* alone justifies this Court's review.

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[1] If the Court agrees with the government that this case "does not merit this Court's *plenary* review" (Gov't Br. 6, 10 (emphasis added)), the conflict with this Court's decisions is sufficiently clear, and the issue is of sufficient importance, that the appropriate course of action would be summary reversal, not denial of certiorari.

See, e.g., *United States v. Gaddis*, 424 U.S. 544, 547 (1976). Accordingly, as leaders of the antitrust bar have already recognized and stated in an amicus brief, there clearly exist circumstances that call for this Court's intervention — similarly situated plaintiffs who sue foreign price fixers will face significantly different burdens of proof depending upon whether they are in the Fourth Circuit or another circuit. *See ABA International Antitrust Bulletin*, Fall 2002, at 1 (noting Fourth Circuit decision and commenting that "[w]e anticipate that this unsettled area will continue to cause divisions among courts").

Moreover, even if one focuses exclusively on the holdings of the courts, the government is simply incorrect in stating that there is no "conflict in the circuits on the question presented." Gov't Br. 1. The question presented, as stated by the government, is whether the jurisdictional test for a Sherman Act case against a global cartel that makes substantial sales in interstate commerce "is governed by *McLain* . . . or by *Hartford Fire*." Gov't Br. I. In other words, is the jurisdictional requirement satisfied by showing that "the defendant's activity is itself in [domestic] interstate commerce" (Gov't Br. 8 (quoting *McLain*, 444 U.S. at 242)) or must the plaintiff also show that the activity caused "substantial domestic effects" (Gov't Br. 7 (citing *Hartford Fire*, 509 U.S. at 796))? This is the question that was presented to the Third Circuit in *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), and that court definitively resolved the issue contrary to the Fourth Circuit's decision in this case. *Carpet Group* sets out standards governing the jurisdictional reach of the Sherman Act and the *per se* rule in that circuit, and it establishes a clear conflict in the circuits on the question of when *McLain* governs or, alternatively, when an *Alcoa/Hartford Fire* burden must be met.

In *Carpet Group*, the trial court dismissed the plaintiffs' case for failure to prove that the defendants' actions "substantially affect[ed] United States commerce. 227 F.3d at 64. Thus, the appeal presented the same issue that was presented to the Fourth Circuit — namely, whether plaintiffs were required to make that *Hartford Fire* substantial effect showing. *Id.* at 73. The Third Circuit held that the governing test was provided by *McLain*, not by *Hartford Fire*, because *Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Id.* at 75. Therefore, the *Carpet Group* plaintiffs were required to show only that "'the defendants' activity is itself in interstate commerce'" and "no 'effects' test even comes into play." *Id.* (quoting *McLain*, 444 U.S. at 242). The Third Circuit thus resolved the precise question presented in the government's brief in direct conflict with the resolution of that issue by the Fourth Circuit; in the Third Circuit, the *Hartford Fire* substantial effect test does not apply except in the case of "wholly foreign conduct."

The ruling that *McLain* governs was the Third Circuit's holding, not "dicta"; it is the government that relies on dicta when it focuses on the Third Circuit's observation that the conduct in *Carpet Group* occurred primarily in the United States. *See* Gov't Br. 11. This Court should grant certiorari to ensure a strong, consistent U.S. policy against offshore cartels that victimize U.S. consumers and to standardize the jurisdictional reach of the Sherman Act and the *per se* rule throughout the circuits.

3. The government also asserts that, even if this case otherwise warrants Supreme Court review, this Court should deny certiorari because of "[a]dditional considerations." Gov't Br. 12. These "considerations" largely consist of a single point that has never been raised by respondents — not at trial, not on appeal, and not in their brief in opposition. The government states that certiorari is inappropriate

because petitioners once proposed a jury instruction (rejected by the trial court) that went beyond *McLain* in that it instructed the jury to consider whether the price-fixing conspiracy affected U.S. price levels. The government's argument that this fact impedes appellate review is inconsistent with hornbook law, unsupported by the cited authorities, and plainly irrelevant here where the major error is not the instruction itself but the dismissal after petitioners prevailed on the price-fixing verdict.

There is no dispute that petitioners timely and vigorously objected to (and appealed) the erroneous jury instructions, the giving of the second special verdict, and the refusal to ignore or overturn it. *See* Pet. App. 36a-38a. Thus, even if petitioners had suggested an *identical* instruction (and in fact petitioners' proffered instruction was significantly different from the one given to the jury), that would not affect petitioners' ability to pursue the merits of their appeal, and it is entirely irrelevant to this Court's certiorari determination.[2] It is hornbook law that, if a party suggests an erroneous instruction, but then rectifies the error "by objecting to the instruction when it is given, *it may have appellate review of the instruction.*" 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2558, at 472 (2d ed. 1995) (emphasis added); *see General Beverage Sales Co. v.*

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[2] The instruction once suggested by petitioners stated that respondents' sales in commerce were not disputed and asked the jury to decide whether the conspiracy "affected the U.S. price" of rubber thread. C.A. App. 3663. The instruction given by the court, over petitioners' objection, required the jury to find a "'substantial effect' on the U.S. market," not an effect on price. C.A. App. 1352-53. Even standing alone, these key phrases are not similar, and the instructions as a whole were even more different.

East Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978); *Alabama Great Southern R. Co. v. Johnson*, 140 F.2d 968, 970-73 (5th Cir. 1944).[3]

The government invokes two cases to support its assertion that petitioners' proposed, but rejected, instruction counsels against granting review (Gov't Br. 12-14), but both of these cases in fact point to the opposite conclusion. In *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), the Court dismissed a writ of certiorari as improvidently granted because petitioner "did not object to the jury instruction" at issue, contrary to the requirement of Fed. R. Civ. P. 51. *Id.* at 258, 259. The Court also noted that the certiorari "petition did not explicitly present the . . . question, and it had not been addressed" by the court of appeals. *Id.* at 260. Here, by contrast, petitioners fully complied with Rule 51 by timely objecting to the relevant instruction, the question was clearly presented in the petition, and it was the focus of petitioners' appeal and of the court of appeals decision. *Kibbe* certainly does not suggest that certiorari is inappropriate where there is no Rule 51 issue. *See United States v. Wells*, 519 U.S. 482, 488 n.6 (1997); *United States v. Williams*, 504 U.S. 36, 43 n.3 (1992).

The government also relies on *Wells*, which even more clearly contradicts its position. In that case, the petitioner arguably "invited error" by proposing an instruction that was

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[3] Moreover, given that petitioners timely objected to the instructions and appealed on that basis, the government's objection would have to rest on some kind of nonjurisdictional estoppel theory. But there is no claim of prejudice, and this Court has repeatedly held that nonjurisdictional procedural objections will not deter consideration of the merits if not raised in the brief in opposition. *Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

given to the jury and then arguing to this Court a position inconsistent with that instruction. The Court nevertheless declined to dismiss the case, applying its "traditional rule that we may address a question properly presented in a petition for certiorari if it was 'pressed [in] or passed on' by the Court of Appeals." *Id.* at 488 (citation omitted). Here, petitioners did not "invite error" because they rectified their position by clearly advising the trial judge that *McLain*, not *Alcoa/Hartford Fire*, should govern, and they timely objected to the erroneous instruction in the trial court. Indeed, petitioners objected to seven different instructions containing the "substantial effect" on U.S. commerce language, objected to the special verdict form, and argued post-trial and on appeal that the instructions and special verdict were erroneous. *See* Pet. App. 36a-38a. It follows *a fortiori* that there is no impediment here to granting certiorari and correcting the fundamental error of the Fourth Circuit.[4]

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[4] There is no basis for the government's suggestion that "the facts are not entirely clear" that there was sufficient domestic commerce to justify a *McLain* instruction. Gov't Br. 9. Respondents never disputed the scope of their interstate commerce. They stipulated to the authenticity of their business records, which were the primary evidence on this topic, and agreed not to introduce "documentary or testimonial evidence from Malaysia" to contradict those records. *See* C.A. App. 190-92. The government also incorrectly asserts that petitioners "did not articulate to the district court that, under *McLain*, the Sherman Act applied to the alleged conduct to the extent that it involves domestic commerce." Gov't Br. 12. In fact, petitioners argued precisely that point in a separate brief filed during the trial. *See* Pls.' Mem. of Law Regarding *Hartford Fire* (Mar. 9, 2001; Dkt. No. 233) at 2 ("Such companies' U.S. sales are unquestionably domestic conduct, so the usual 'affecting commerce' threshold of Sherman Act jurisdiction applies to them.").

Moreover, the trial court's entry of judgment for respondents was plain error in light of *McLain*. Where the *McLain* test applies, at least in civil cases, the plaintiff prevails after a jury verdict finding that the goods moving in interstate commerce were subject to a price fix, and a jury finding of no effect on commerce is superfluous and should be nullified when challenged by post-trial motion or on appeal. *Gough v. Rossmor Corp.*, 487 F.2d 373 (9th Cir. 1973); *see also Wirtz v. Lafitte,* 326 F.2d 856 (5th Cir. 1964).

4. The government expresses no opinion on the merits of the second question presented — namely, assuming arguendo that a *Hartford Fire* substantial effects inquiry was appropriate, was it correct to make the jury the final arbiter of that issue. The government simply asserts that this issue is not properly presented because petitioners failed to raise it in a Rule 50 motion before the trial court. Gov't Br. 14-15. That assertion is mistaken and provides no reason for failing to consider an issue of recurring importance on which the circuits are in conflict.

The lower courts' rejection of petitioners' position on this point rests on the incorrect assumption that the effects test is an element of the claim that the jury must determine, even if substantial commerce is admitted. In other words, the courts treated the issue as one of fact on which the jury's verdict can be overturned only if there is no evidence to support its conclusion. But as this Court noted in *Hartford Fire* (509 U.S. at 796 n.22), the effects test is a prerequisite of "subject matter jurisdiction," and courts are thus empowered to determine when undisputed facts satisfy this jurisdictional requirement. A Rule 50 motion is a prerequisite to a post-trial challenge or appeal only when a fact issue is reserved for the jury. *See Burke v. Ford*, 389 U.S. 320 (1967); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d at 946; *Gough v. Rossmor Corp.*, *supra*; *Wirtz v. Lafitte*, *supra*.

The Seventh Circuit decision in *United Phosphorus* specifically addresses this issue and concludes that the effects issue is for the court, not for the jury: "[T]he power of the courts is precisely what subject matter jurisdiction is about. For all of these reasons, we find that the district court properly treated the [effects] issue as one of subject matter jurisdiction." 322 F.3d at 952. In *United Phosphorus*, plaintiffs' own expert testified that U.S. sales of the affected product would be "less than substantial," and thus no jurisdiction was found. Here, it is undisputed that the cartel sold 50 million pounds of rubber thread into U.S. commerce at between $1.10 and $1.80 per pound, and the government acknowledges that this evidence is sufficient to establish jurisdiction. *See* Gov't Br. 9-10; *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 501-02 (1969).

The Fourth Circuit treats subject matter jurisdiction as a nearly non-reviewable jury question. The Seventh Circuit says effect on commerce is a legal question for the court, and not a jury question when substantial commerce is undisputed, as was held in *Fortner*. Thus, there is a split in the circuits regarding the role of the jury in substantial effect cases. This split would justify review even if the evisceration of the *McLain* rule and overextension of *Alcoa* did not.

CONCLUSION

Unless this Court acts, two small family-owned U.S. businesses that unmasked a worldwide price-fixing cartel will have to pay over $60,000 in taxable costs to the cartel's leaders. The government agrees with petitioners that those defendants were exonerated only because of the Fourth Circuit's erroneous nullification of this Court's decision in *McLain*. What kind of message would such a result send to multinational price-fixers, or to Americans thinking about taking on an international cartel? And why should this Court leave unresolved a situation in which cartel defendants will

have a powerful incentive to seek haven in the Fourth Circuit, where *Alcoa* tests will often shield mixed cartels and jury findings of no substantial effect are treated as unchallengable, regardless of sales, prices, or profits?

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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